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United States  
Circuit Court of Appeals

For the Ninth Circuit.

CARRIE GATES, CHARLES ELMER GATES  
and LLOYD GATES, by his Guardian,  
Carrie Gates,

Appellants,

vs.

GENERAL CASUALTY COMPANY OF AMER-  
ICA, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Northern Division.

FILED

JAN 17 1911

PAUL P. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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CARRIE GATES, CHARLES ELMER GATES  
and LLOYD GATES, by his Guardian,  
Carrie Gates,

Appellants,

vs.

GENERAL CASUALTY COMPANY OF AMER-  
ICA, a corporation,

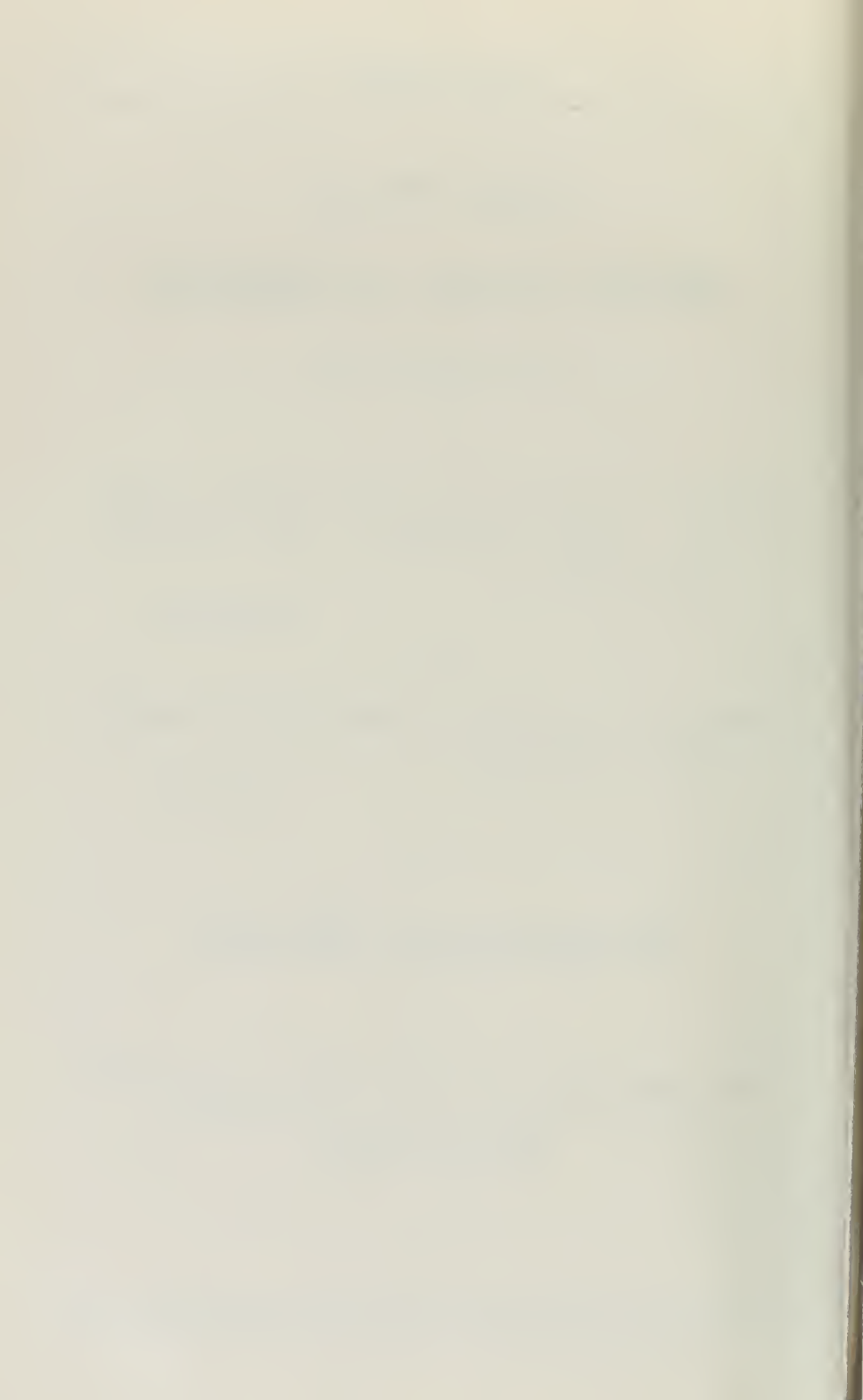
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Northern Division.



# INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer of Defendant to Complaint.....	11
Appeal:	
Certificate of Clerk (District Court).....	88
Designation of Contents of Record on, Ap- pellants, .....	90
Notice of .....	25
Statement of Evidence on .....	26
Statement of Points on .....	90
Attorneys, Names and Addresses of .....	1
Certificate of Clerk to Transcript of Record.....	88
Complaint .....	2
Conclusions of Law .....	21
Deposition of John Drenth .....	53
Designation of Contents of Record on Appeal, (Circuit Court of Appeals) .....	90
Findings of Fact and Conclusions of Law .....	17
Judgment .....	23
Names and Addresses of Attorneys of Record	1
Notice of Appeal .....	25

Index	Page
Order for Removal of Cause to U. S. District Court .....	10
Petition for Removal of Cause to U. S. District Court .....	6
Removal:	
Order for .....	10
Petition for .....	6
Statement of Evidence (For detailed index see "Testimony") .....	26
Statement of Points on Appeal (Circuit Court of Appeals) .....	90
Stipulation Waiving Trial by Jury .....	16
Testimony .....	26
Exhibit for defendant:	
A—Letter dated October 1934 to R. O. Deacon from Ben C. Sturges.....	29
Exhibit for plaintiffs:	
2—Letter dated May 5, 1934 to Empire Agency Corporation from R. O. Deacon Lumber Co. ....	33
Witnesses:	
Drenth, John (Deposition)	
—direct .....	54
—cross .....	64
—redirect .....	77
—recross .....	78
—redirect .....	83

Index	Page
(Witnesses—cont.):	
Drenth, John (Deposition—cont.):	
—recross .....	84
—redirect .....	85
—recross .....	85
—redirect .....	86
—recross .....	87
Haney, William E.	
—direct .....	39
—cross .....	45
Masi, A. V.	
—direct .....	47
—cross .....	48
Munroe, H. H.	
—direct .....	50
Sturges, Ben C.	
—direct .....	26
—cross .....	32
—redirect .....	39
Swift, C. L.	
—direct .....	49





## NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

DAVID E. PECKINPAH, Esq.,  
HAROLD M. CHILD, Esq., and  
L. N. BARBER, Esq.,  
431 Brix Building,  
Fresno, California.

For Appellee:

MESSRS. REDMAN, ALEXANDER &  
BACON,  
JEWEL ALEXANDER, Esq., and  
W. C. BACON, Esq.,  
315 Montgomery Street,  
San Francisco, California. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California  
In and for the County of Fresno

No. 58505—Dept. 1

CARRIE GATES, CHARLES ELMER GATES  
and LLOYD GATES, by his Guardian,  
CARRIE GATES,

Plaintiffs,

vs.

GENERAL CASUALTY COMPANY OF AMER-  
ICA, a corporation,

Defendant.

COMPLAINT ON PUBLIC LIABILITY  
POLICY

Plaintiffs complain of defendant and for cause  
of action allege:

I.

That plaintiff Lloyd Gates is a minor of the age  
of 19 years; that on the 20th day of April, 1937,  
letters of guardianship of the estate of said minor  
were issued out of the above entitled court to Carrie  
Gates, who ever since has been and now is the duly  
appointed, qualified and acting guardian of the es-  
tate of said minor.

II.

That on or about the 2nd day of June, 1934, in  
the County of Fresno, State of California, defend-  
ant made, executed and delivered to the R. O.  
Deacon Lumber Company, a corporation, its certain  
policy or contract of indemnity in writing, wherein  
and whereby the said defendant insured the said

Deacon Lumber Company for a term beginning at noon on the 2nd day of [2] June, 1934, and ending at noon on the 2nd day of June, 1935, and agreed to pay all sums which the assured should become liable to pay as damages imposed by law for bodily injuries, including death at any time resulting therefrom accidentally suffered or alleged to have been suffered by any person or persons by reason of the ownership, maintenance or use of a certain Moreland truck, Motor No. 119852 and a certain Utility trailer, Serial No. 7486, during the term of said policy and agreed to defend suits for damages brought on account of accidents covered by said policy in the name or on behalf of the assured, and to pay in addition to damages all costs taxed against the suit in any legal proceedings defended by the said defendant and interest accruing upon that part of any judgment rendered in connection therewith, which should not be in excess of the policy limit, which said policy limit was the sum of five thousand dollars (\$5,000.00) for death of or injuries to any one person.

### III.

That plaintiffs are the next of kin and heirs at law of Elmer Gates, now deceased.

### IV.

That on or about the 20th day of September, 1934, while the said Deacon Lumber Company was engaged in hauling lumber by means of the said truck and trailer, the said Elmer Gates came to his death as a result of the falling of the said lumber there-

from; that on or about the 1st day of November, 1934, plaintiffs commenced an action in the Superior Court of the State of California, in and for the County of Fresno, against the said Deacon Lumber Company and alleged in their complaint in said action that the said Elmer Gates came to his death as a result of the negligence of the said Deacon Lumber Company in the use and operation of the truck and trailer described in said policy of insurance; that the said Deacon Lumber Company notified [3] defendant of said action and requested said defendant to defend said action in the name and on behalf of said assured; that the defendant failed and refused and has at all times failed and refused to defend the said action; that thereafter and on the 20th day of November, 1936, judgment was duly given and rendered in said action whereby it was adjudged that the plaintiffs have and recover, of and from the said Deacon Lumber Company the sum of five thousand dollars (\$5,000.00) damages, together with their costs and disbursements in said action in the sum of two hundred fifteen dollars and three cents (\$215.03) and interest on said damages and costs from the date of the entry of said judgment at the rate of 7% per annum; that thereafter plaintiffs caused an appeal to be taken from the said judgment and on the 27th day of August, 1938, a remittitur was duly filed in the office of the County Clerk of the said Superior Court affirming the said judgment.

#### V.

That the said judgment has not been paid nor any part thereof.

Wherefore, plaintiffs pray judgment against the said defendant for the sum of \$5,215.03 with interest thereon from the 20th day of November, 1936, to the entry of judgment herein at the rate of 7% per annum and for the costs and disbursements of plaintiffs in this action.

DAVID E. PECKINPAH,  
Attorney for Plaintiffs. [4]

State of California,  
County of Fresno—ss.

Carrie Gates, being first duly sworn, deposes and says:

That she is one of the plaintiffs in the above entitled action; that she has read the foregoing Complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated on information and belief, and as to those matters that she believes it to be true.

CARRIE GATES

Subscribed and sworn to before me, this 27th day of January, 1939.

(Seal) MOLLY POOLE

Notary Public in and for the County of Fresno,  
State of California.

[Endorsed]: Filed May 23, 1939. E. Dusenberry,  
Clerk. By L. H. Bendoski, Deputy.

[Indorsed]: Filed Jul. 25, 1939. R. S. Zimmerman,  
Clerk. By Edmund L. Smith, Deputy Clerk.

[5]

In the Superior Court of the State of California  
In and for the County of Fresno

No. 58505 Dept. 1

CARRIE GATES, CHARLES ELMER GATES  
and LLOYD GATES, by his Guardian,  
Carrie Gates,

Plaintiffs,

vs.

GENERAL CASUALTY COMPANY OF AMER-  
ICA, a corporation,

Defendant.

PETITION OF DEFENDANT FOR REMOVAL  
OF CAUSE TO DISTRICT COURT OF  
THE UNITED STATES.

To the Honorable, The Superior Court of the State  
of California, in and for the County of Fresno:

Your petitioner, the above-named defendant, Gen-  
eral Casualty Company of America, a corporation,  
respectfully shows to this Honorable Court that the  
above-entitled suit was heretofore brought by the  
above-named plaintiffs in this Court; that summons  
was issued herein and that said summons was served  
with a copy of the complaint upon your petitioner  
in the County of Los Angeles, State of California;  
that the time has not elapsed wherein your peti-  
tioner is allowed under the practice and laws of the  
State of California and the rules of this Court to  
appear, plead, demur or answer to said complaint.

That said plaintiffs were at the time of the commencement of said action, and ever since have been and now are, citizens of the State of California and residents of said State of Cali- [6] fornia; that your petitioner was at the time of the commencement of said action, and ever since has been and now is, a non-resident of the State of California, to-wit: a resident of the State of Washington, and at all of said times was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

And your petitioner further represents that the suit above-entitled is of a civil nature and was brought at common law and pursuant to statute by said plaintiffs for the purpose of recovering more than the sum of Three Thousand Dollars (\$3,000.00), to-wit: to recover the sum of Five Thousand Two Hundred Fifteen and 03/100 Dollars (\$5,215.03), with interest and costs, which plaintiffs allege is owing to them by defendant by reason of the terms of an alleged policy of insurance. That your petitioner denies said liability and disputes said claim. That the matter in dispute in said action exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs.

Your petitioner further represents that it offers and files herewith its bond with good and sufficient surety, as required by the Act of Congress, that it will enter in the District Court of the United States, for the Northern Division of the Southern District of California, within thirty (30) days from the fil-

ing of its petition for removal, a certified copy of the record in said suit and for the payment of all costs that may be awarded by said District Court of the United States if such court shall hold that such suit was wrongfully or improperly removed thereto; and that your petitioner further desires to remove said cause into the District Court of the United States for the Northern Division of the Southern District of California pursuant to statute in such case made and provided.

Your petitioner therefore prays that this petition and said bond may be accepted by this Court; that said suit may be [7] removed into the next District Court of the United States for the Southern District of California, the Northern Division thereof, pursuant to the aforesaid statute in such case made and provided, and that a transcript of the record herein be directed to be made up as provided by law, and that no further proceedings be had herein in this Court; and for such other and further relief as may be proper.

And your petitioner will ever pray.

GENERAL CASUALTY COMPANY  
OF AMERICA

By REDMAN, ALEXANDER &  
BACON

Attorneys for Petitioner.

State of California

City and County of San Francisco—ss.

W. C. Bacon, being first duly sworn, deposes and says: That he is an attorney at law and a member



of the firm of Redman, Alexander & Bacon, attorneys for General Casualty Company of America, a corporation, the defendant in the above-entitled action; that he makes this verification on behalf of said defendant for the reason that there is no officer of said defendant corporation present in the city and county wherein its attorneys have their offices; that affiant has read the foregoing petition for removal of cause, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon information or belief, and that as to such matters he believes it to be true.

W. C. BACON

Subscribed and sworn to before me this 22nd day of June, 1939.

(Seal)

DOROTHY H. McLENNAN

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 26, 1939. E. Dusenberry, Clerk.

[Indorsed]: Filed Jul. 25, 1939. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[8]

In the Superior Court of the State of California  
In and for the County of Fresno

No. 58505—Dept. 1

CARRIE GATES, CHARLES ELMER GATES  
and LLOYD GATES, by his Guardian,  
Carrie Gates,

Plaintiffs,

vs.

GENERAL CASUALTY COMPANY OF AMER-  
ICA, a corporation,

Defendant.

ORDER FOR REMOVAL OF CAUSE TO  
UNITED STATES DISTRICT COURT

It appearing that General Casualty Company of America, a corporation, defendant in the above-entitled action, has filed its petition for the removal of this cause to the United States District Court, in and for the Southern District of California, Northern Division thereof, in accordance with the law therefor provided, and said defendant has filed its bond duly conditioned with good and sufficient surety as provided by law, and it appearing to the Court that reasonable notice of said petition and bond has been given to said plaintiff, and that this is a proper cause for removal to said District Court,

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that said petition and bond be, and the same are, accepted and approved, and that this cause be, and it is hereby removed to the United States District Court, in and for the Southern Dis-

trict of California, Northern Division thereof, and the Clerk is hereby [12] directed to make a copy of the record in said cause, duly certified, for transmission to said District Court forthwith, and that no further proceedings be taken in this Court.

Done in Open Court this 26th day of June, 1939.

T. R. THOMSON

Judge of the Superior Court

[Endorsed]: Filed June 26, 1939. E. Dusenberry, Clerk.

[Indorsed]: Filed Jul. 25, 1939. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[13]

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In the United States District Court for the  
Southern District of California,  
Northern Division

No. 30 Civil

CARRIE GATES, CHARLES ELMER GATES  
and LLOYD GATES, by his Guardian,  
CARRIE GATES,

Plaintiffs,

vs.

GENERAL CASUALTY COMPANY OF AMER-  
ICA, a corporation,

Defendant.

ANSWER TO COMPLAINT

Comes now defendant and answering plaintiffs' complaint on file herein, denies and alleges as follows:

## I.

Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph I of said complaint, and therefore and [15] placing its denial upon that ground denies each and every allegation in said paragraph contained.

## II.

Answering paragraph II of said complaint, defendant admits that on the date alleged it issued to R. O. Deacon Lumber Company, a corporation, by delivering to said corporation's broker at San Francisco, California a policy of automobile liability insurance for the term referred to, which policy included the Moreland truck described, in the amount and for the policy limit set forth in said paragraph and containing substantially the terms therein set forth; except as herein admitted defendant denies generally and specifically, all and singular the allegations of said paragraph; and in this behalf defendant alleges that said policy of insurance was duly rescinded by defendant as hereinafter more specifically set forth.

## III.

Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph IV of said complaint, and therefore and placing its denial upon that ground denies each and every allegation in said paragraph contained, except that defendant admits

notice of the accident and the request of R. O. Deacon Lumber Company to defendant to defend the action therein referred to and the refusal of defendant to do so.

#### IV.

Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph V of said complaint, and therefore and placing its denial upon that ground denies each and every allegation in said paragraph contained. [16]

#### V.

Further answering said complaint and as a separate defense thereto defendant is informed and believes and therefore alleges that, pursuant to provisions of the California Workmen's Compensation Insurance and Safety Act of 1917 and the Labor Code of the State of California, San Joaquin Light & Power Company, a corporation, perfected a lien in the amount of \$5,250.00 upon the judgment obtained by plaintiffs against R. O. Deacon Lumber Company, and that plaintiffs have not now and did not have at the time of the commencement of the above-entitled action any right, title or interest in and to said judgment upon which the above-entitled action is predicated.

#### VI.

Further answering said complaint and as a separate defense thereto, defendant alleges that prior to the issuance of the policy of insurance referred to in plaintiff's complaint to the R. O. Deacon

Lumber Company by defendant, specific inquiry was made of said R. O. Deacon Lumber Company by defendant through the broker or agent for the name of its prior insurance carrier and the number and other available information on liability and property damage claims against said R. O. Deacon Lumber Company preceding the application for the insurance policy from this defendant; that upon information furnished by said R. O. Deacon Lumber Company through its broker or agent in San Francisco to defendant, defendant issued the policy referred to in plaintiff's complaint; that in the month of October, 1934 defendant learned for the first time that the statements and information furnished by said R. O. Deacon Lumber Company in response to defendant's specific inquiry regarding prior insurance carriers and the number and other available information on [17] liability and property damage claims against said defendant preceding said company's application to defendant were incorrect and incomplete; and defendant alleges that said R. O. Deacon Lumber Company fraudulently misrepresented the facts to defendant and fraudulently concealed the fact that for a period of time prior to the issuance of defendant's policy said R. O. Deacon Lumber Company was insured with the Metropolitan Casualty Company and that during said time several serious liability claims for personal injuries and a number of property damage claims were made against said R. O. Deacon Lumber Company resulting in substantial losses to said Metropolitan

Casualty Company; and defendant further alleges that had this information been furnished it in response to its specific inquiry prior to the issuance of its policy, defendant would not have issued said policy to said R. O. Deacon Lumber Company; that upon learning of said concealment of facts for which defendant made specific inquiry and upon which it would have determined whether it would issue the policy applied for, defendant immediately rescinded said policy of insurance referred to in plaintiff's complaint and gave notice of rescission thereof to said R. O. Deacon Lumber Company together with the reasons therefor, and returned at said time to said R. O. Deacon Lumber Company the premium and all consideration received by defendant from said R. O. Deacon Lumber Company for said policy.

Wherefore, defendant prays to be hence dismissed with its costs.

REDMAN, ALEXANDER &  
BACON

Attorneys for Defendant. [18]

State of California

City and County of San Francisco—ss.

W. C. Bacon, being first duly sworn, deposes and says: That he is an attorney at law and a member of the firm of Redman, Alexander & Bacon, attorneys for defendant in the above-entitled action; that affiant makes this verification for the reason that defendant has no officer or other person authorized

to verify the foregoing answer within the City and County of San Francisco wherein its attorneys have their offices; that affiant has read the foregoing answer, knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to such matters that he believes the same to be true.

W. C. BACON

Subscribed and sworn to before me this 17th day of August, 1939.

(Seal) ORAH M. NICHOLS

Notary Public in and for the City and County of San Francisco, State of California.

[Indorsed]: Filed Aug. 19, 1939. [19]

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[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the above entitled case may be tried before the court without a jury, and a jury is hereby waived.

Dated: October 26th, 1939.

DAVID E. PECKINPAH

Attorney for Plaintiffs.

REDMAN, ALEXANDER &  
BACON

Attorneys for Defendant.

[Indorsed]: Filed Oct. 26, 1939. [20]



[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW.

The above-entitled action came on duly and regularly for trial before the above-entitled court, Honorable C. E. Beaumont, judge presiding, without a jury, a jury having been duly waived. David E. Peckinpah, Harold M. Child and L. N. Barber appeared as attorneys for plaintiffs, and Redman, Alexander & Bacon appeared [22] as attorneys for defendant. The matter having been duly heard, submitted, and considered, the Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

(1)

Plaintiff Lloyd Gates is a minor of the age of 19 years; on April 20, 1937, letters of guardianship of the estate of said minor were issued out of the Superior Court of the State of California in and for the County of Fresno to plaintiff Carrie Gates, who ever since has been and now is the duly appointed, qualified, and acting guardian of the estate of said minor.

(2)

On or about June 2, 1934, defendant as insurer made, executed, and delivered to R. O. Deacon Lumber Company, a corporation, as insured, by delivering to said corporation's broker at San Francisco, California, its certain policy or contract of

indemnity in writing, wherein and whereby the said defendant insured the said corporation for a term beginning at noon on June 2, 1935, and agreed to pay all sums which the insured should become liable to pay as damages imposed by law for bodily injuries, including death at any time resulting therefrom accidentally suffered or alleged to have been suffered by any person or persons by reason of the ownership, maintenance or use of a certain Moreland truck, Motor No. 119852, and a certain Utility trailer, Serial No. 7486, during the term of said policy, and agreed to defend suits for damages brought on account of accidents covered by said policy in the name or on behalf of the insured, and to pay in addition to damages all costs taxed against the insured in any legal proceedings defended by said defendant and interest accruing upon that part of any judgment rendered in connection therewith, which should not be in excess of the policy limit, [23] which said policy limit was the sum of five thousand dollars (\$5,000.00) for death of or injuries to any one person; said defendant thereafter rescinded said policy and said contract of indemnity or insurance was thereby extinguished as hereinafter found.

(3)

Plaintiffs are the next of kin and heirs at law of Elmer Gates, now deceased.

(4)

On or about September 20, 1934, while the said R. O. Deacon Lumber Company, a corporation, was

engaged in hauling lumber by means of said truck and trailer, said Elmer Gates came to his death as a result of the falling of the said lumber therefrom; on or about November 1, 1934, plaintiffs commenced an action in the Superior Court of the State of California, in and for the County of Fresno, against the said corporation and alleged in their complaint in said action that the said Elmer Gates came to his death as a result of the negligence of said corporation in the use and operation of said truck and trailer; said corporation notified defendant of said action and requested defendant to defend said action in the name of and on behalf of said insured; defendant refused and at all times has refused to defend said action; on November 20, 1936 judgment was duly given and rendered in said action whereby it was adjudged that plaintiffs have and recover of and from said corporation the sum of five thousand dollars (\$5,000.00) damages, together with their costs and disbursements in said action in the sum of two hundred fifteen dollars and three cents (\$215.03), and interest on said damages and costs from the date of entry of said judgment at the rate of 7% per annum; plaintiffs caused an appeal to be taken from said judgment, and on August 27, 1938, a remittitur was duly filed in the office of the County Clerk of said Superior Court affirming [24] said judgment.

(5)

Said judgment has not been paid; no part of said judgment has been paid.

(6)

Prior to the issuance and delivery of said policy specific inquiry was made of said R. O. Deacon Lumber Company by defendant through the broker or agent for the name of its prior insurance carrier and the number and other available information on liability and property damage claims against said R. O. Deacon Lumber Company preceding the application for the insurance policy from defendant; upon information furnished by said R. O. Deacon Lumber Company through its broker or agent in San Francisco to defendant, defendant issued and delivered the said policy; in the month of October, 1934, defendant learned for the first time that the statements and information furnished by said R. O. Deacon Lumber Company in response to defendant's specific inquiry regarding other insurance carriers and the number and other available information on liability and property damage claims against said R. O. Deacon Lumber Company preceding said corporation's application to defendant were incorrect and incomplete; said R. O. Deacon Lumber Company fraudulently misrepresented the facts to defendant and fraudulently concealed the fact that for a period of time prior to the issuance of defendant's policy said R. O. Deacon Lumber Company was insured with the Metropolitan Casualty Company and during said time several serious liability claims for personal injuries and a number of property damage claims were made against said R. O. Deacon Lumber Company resulting in sub-

stantial losses to said Metropolitan Casualty Company, had said information been furnished defendant in response to its specific inquiry prior to the issuance of said policy, defendant would not have issued or delivered said policy to said R. O. Deacon Lumber Company; upon [25] learning of said concealment of facts for which defendant made specific inquiry and upon which it would have determined whether it would issue the policy applied for, defendant immediately rescinded said policy of insurance and gave notice of rescission thereof to said R. O. Deacon Lumber Company together with the reasons therefor, and returned at said time to said R. O. Deacon Lumber Company the premium and all consideration received by defendant from the said R. O. Deacon Lumber Company for said policy.

### CONCLUSIONS OF LAW

From the foregoing findings of fact the Court makes the following conclusions of law:

(1)

Plaintiffs shall take nothing by the above-entitled action.

(2)

Defendant duly and regularly rescinded said policy of insurance, and thereby said contract of insurance or indemnity was extinguished.

(3)

Defendant is entitled to judgment against plaintiffs and each of them for costs of suit incurred herein.

Let judgment be entered accordingly.

Dated: July 15, 1940.

C. E. BEAUMONT

U. S. District Judge.

Approved as to form under Rule 8 of above Court.

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Attorneys for Plaintiff

Received a copy of the within Findings of Fact and Conclusions of Law at the Hour of 2:40 P. M. this 23 day of May, 1940.

DAVID E. PECKINPAH

HAROLD M. CHILD

L. N. BARBER

Attorneys for Plaintiffs.

[Indorsed]: Filed Jul. 15, 1940. [26]

In the United States District Court for the  
Southern District of California,  
Northern Division  
No. 30 Civil

CARRIE GATES, CHARLES ELMER GATES,  
and LLOYD GATES, by his Guardian,  
CARRIE GATES,

Plaintiffs,

vs.

GENERAL CASUALTY COMPANY OF AMER-  
ICA, a corporation,

Defendant.

### JUDGMENT

This cause came on regularly for trial on the 26th day of October, 1939 before the above-entitled Court, sitting without a jury, a trial by jury having been waived by the parties, Messrs. David E. Peckinpah, Harold M. Child and L. N. Barber appearing as attorneys for plaintiffs, and Messrs. Redman, Alexander & Bacon, by Jewel Alexander, Esq., appearing as attorneys for defendant, and the trial having been proceeded with, witnesses [27] on the part of the plaintiffs and defendant having been duly sworn and examined, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having rendered its decision and findings in writing on file herein and ordered that judgment be

entered in accordance therewith in favor of defendant and against plaintiffs;

Wherefore, by virtue of the law and by reason of the premises and findings aforesaid,

It Is Ordered, Adjudged and Decreed that plaintiffs do have and recover nothing of and from defendant and that defendant have judgment against plaintiffs and each of them for its costs of suit incurred herein, amounting to the sum of \$202.54.

Dated: July 15, 1940.

C. E. BEAUMONT

U. S. District Judge.

Judgment entered May....., 1940.

Approved as to form under Rule 8 of above Court.

.....  
Attorneys for Plaintiff.

Received a copy of the within Judgment at the hour of 2:40 P. M. this 23d day of May, 1940.

DAVID E. PECKINPAH

L. N. BARBER

HAROLD M. CHILD

Judgment Entered Jul. 15, 1940. Docketed Jul. 15, 1940. C. O. Book 1, Page 141.

R. S. ZIMMERMAN,

Clerk

By R. B. CLIFTON,

Deputy.

[Indorsed]: Filed Jul. 15, 1940. [28]



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered in the above entitled action, against the said plaintiffs and in favor of the above named defendant, on the 15th day of July, 1940, and from the whole of said judgment.

Dated: October 9th, 1940.

DAVID E. PECKINPAH,  
HAROLD M. CHILD,  
L. N. BARBER,  
Attorneys for Plaintiffs. [29]

AFFIDAVIT OF SERVICE BY MAIL  
C. C. P. 1013A

(Must be attached to original or a true copy  
of paper served)  
No. 30 Civil

State of California,  
County of Fresno—ss.

Dorothy Enos, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of Fresno County, and not a party to the within action. That affiant's residence (business) address is 431 Brix Building, Fresno, California. That affiant served a copy of the attached Notice of Appeal by placing said copy in an envelope addressed to Redman, Alexander & Bacon,

Attorneys at Law, at his office (residence) address 315 Montgomery Street, San Francisco, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on October 9th, 1940, deposited in the United States mail at Fresno, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

DOROTHY ENOS.

Subscribed and sworn to before me on October 9th, 1940.

(Seal)

MOLLY POOLE,

Notary Public in and for said county  
and state.

[Indorsed]: Filed Oct. 14, 1940. [30]

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STATEMENT OF TESTIMONY AND PRO-  
CEEDINGS IN NARRATIVE FORM

Testimony of

BEN C. STURGES,

Direct Examination

In the months of April, May and June, 1934, I was Assistant Manager of the General Casualty Company stationed at San Francisco. My duties were to supervise the activities of the branch office

(Testimony of Ben C. Sturges.)

and the underwriting. Mr. John Drenth was an insurance broker in San Francisco. He was licensed as a broker in his own name and not connected with the defendant in any way. He approached me with respect to writing coverage on a fleet of trucks owned and operated by, I believe, the R. O. Deacon Lumber Company. He asked if we wrote such lines and what would be our rates, including fleet discount. I advised him that we did write such fleets, coverage on such fleets, and gave him approximately the rates we charged—advised him, however, that we only entertained fleets where the concern had been quite satisfactory in previous years, both as to frequency of accidents and also that we had the full cooperation of the assured as to maintaining that record in the future. I asked him for the names of the previous carriers and he advised me that he would secure that information, but, as he recalled, it was the Maryland Casualty Company and the Madison-Chicago, the latter company having just recently retired from this state. He later advised me that he had this information and that the Maryland Casualty Company had had a satisfactory record, the total claim payments being something like \$58; and that the Madison Insurance Company had had only some trivial claims, not involving any personal injuries, and no accident frequency beyond the normal expectancy. He mentioned no other insurance carrier at that time, claiming that the two companies covered the pe-

(Testimony of Ben C. Sturges.)

riod of several years previous. He submitted a list of the equipment to Mr. Haney, our chief underwriter, and at that time he recited the matters [37] that he mentioned to me previously as to frequency. And so we proceeded to consider the line on the basis of the information he had given us and to rate it accordingly. The policy was issued in due time. Following the accident that occurred in which Mr. Gates lost his life in September of 1934, the report was made by Mr. Munroe of our claim department in which he stated that he had learned, on investigating the claim, that the Metropolitan Casualty Company had been a previous carrier and that their experience has been quite unsatisfactory, both as to frequency of claims as well as the total amount of claims paid. At that time Mr. Haney was the chief underwriter in the San Francisco Branch Office of the defendant company. Mr. Munroe was with the casualty company, the defendant in this action, and was in the claims department. After the accident in which Mr. Gates lost his life, Mr. Munroe came to Fresno to make an investigation, and it was upon his return that I learned these facts that I have testified to about the Metropolitan. If I had known about the Metropolitan before the policy was issued, the risk would not have been accepted. These facts would have been material to the acceptance or rejection of the risk. Prior to the time that Mr. Munroe came back to San Francisco from Fresno the company did not know anything about the Metropolitan Casualty Company being connected

(Testimony of Ben C. Sturges.)  
with the R. O. Deacon Lumber Company. It was in San Francisco on October 5th, the date on the paper shown to me, or the day previous, October 4th, that I learned of these facts that Mr. Munroe brought back from Fresno to San Francisco. Upon receiving that information I took up the matter of rescinding the contract. The letter marked Defendant's Exhibit A is a copy of the letter that I sent to the R. O. Deacon Lumber Company.

The said exhibit reads as follows: [38]

#### DEFENDANT'S EXHIBIT A

San Francisco, California  
October, 1934

R. O. Deacon Lumber Company  
Lemoore  
California  
Gentlemen:

Referring to the automobile insurance policy, #A-602550, issued to you by the General Insurance Company of America and General Casualty Company of America on or about the 6th day of June, 1934, effective the 2nd day of June, 1934, we beg to state that we have just discovered that statements and information which you furnished us in response to our specific inquiry, regarding your prior insurance carriers and the number and any other available information on liability and property damage claims against you during the year pre-

(Testimony of Ben C. Sturges.)

ceding your application for our policy, were incorrect and incomplete. We have just learned that for a period of time prior to the issuance of our policy you were insured in the Metropolitan Casualty Company and that during that time several serious liability, and a number of property damage claims, were made against you, resulting in substantial losses to that company. Had this information been furnished us in response to our specific inquiry we would not have issued the above numbered policy to you. Accordingly, because of your concealment and misrepresentation of facts materially affecting the acceptance of this risk, the companies hereby rescind the above numbered policy and return to you herewith the premium of \$245.02, which you paid for the same.

Yours truly,

GENERAL INSURANCE  
COMPANY OF AMER-  
ICA and GENERAL CAS-  
UALTY COMPANY OF  
AMERICA

By BEN C. STURGES  
Manager

BCS:C

(Testimony of Ben C. Sturges.)

(Witness continuing.)

After sending that to the R. O. Deacon Lumber Company, I received the return registry receipt of the U. S. Post Office. In that letter of October 5th, 1934, I enclosed a cashier's check on the Wells Fargo Bank refunding the entire amount of the premium. In writing the policy I relied upon the information given to me by John Drenth.

“Q. By Mr. Alexander: In that letter of October 5, 1934, what, if anything, did you enclose besides the letter?

A. Enclosed a cashier's check, as I recall, on the Wells [39] Fargo Bank, refunding the entire amount of the premium.

Q. Before getting to the entire amount of the premium, did Mr. Drenth arrange the method of the payment of premium on that policy?

A. He did at the time, a contract, finance contract was signed by Deacon Lumber Company and the customary down payment was made and, I think, two or three payments, monthly payments were made on the contract. This contract was returned at the time with the cashier's check.

Q. Now, let me see. Then, when the policy was issued, the entire premium was not paid?

A. No.”

“Q. By Mr. Alexander: He made a down payment, then, did he? A. He did.

(Testimony of Ben C. Sturges.)

Q. And did he give you a note for the balance?      A. He did.

Q. On October 5, 1934, when you sent the notice of rescission, Defendant's Exhibit A, how much money did you send him back in that letter?

A. I do not recall the exact amount.

Q. I did not mean the exact amount; but having in mind what he had paid in cash to the company, how much did you return?

A. Returned the entire amount of the down payment, as well as the monthly payments which had been made to us.

Q. Am I right, then, that at that time you returned to him in that letter all the money the company had received to that time?

A. We did.

Q. And did you also return the note which he had given for the payment of the premium?

A. We did.

Q. In other words, you returned to him everything the [40] company had received?

A. Yes."

#### Cross-Examination

I recall seeing the letter marked Plaintiff's Exhibit 2 at a later date following my conversation with Mr. Drenth. I don't remember just what the date was. It was near the date when the policy was written. That was after my first conversation



(Testimony of Ben C. Sturges.)

with Mr. Drenth when he called to place the insurance with us. I would not be able to give you the exact date, I don't think it was a week before the policy was written. I think it was a matter of two or three days. I testified that Mr. Drenth in a conversation with me told me that the Maryland Casualty Company paid a claim. In substance I asked Mr. Drenth concerning the experience of the previous carriers on the line. He said as far as he knew the experience had been satisfactory, that he would secure more definite information later, but he did mention something about the Maryland sustaining some claim around \$58.00, \$53.00 or \$58.00. That was my first conversation with Drenth. He said he would secure further information from the Deacon Lumber Company and submit it to our office. He then submitted the letter designated as plaintiffs' Exhibit 2 along with other information. I do not recall any other letters. Counsel then read

#### PLAINTIFFS' EXHIBIT 2

as follows:

May 5, 1934

Empire Agency Corporation

231 Sansome Street

San Francisco, California

Gentlemen:          Attention: Mr. John Drenth

We note your letter of the 3rd. It should have been answered yesterday but the writer was out of town.

(Testimony of Ben C. Sturges.)

The latter part of September, 1933, one of our trucks had an accident and was completely destroyed. Our insurance was then carried by the Maryland Casualty and this loss cost them too much and they withdrew the coverage shortly after that time. We then placed the insurance through a local agency with the Madison Insurance Company of Indiana. This company recently went through [41] receivership and our insurance is of no value.

Until recently we have been operating more equipment but at present have only one large outfit doing long hauling and some small outfits that haul locally and occasionally do extra work on long haul jobs.

We had one accident of small consequence at Turlock in December during the time Madison carried the coverage. We have not yet been able to find out whether the loss was settled before they failed. There was no damage to our equipment and so far as we could find out only slight damage to that of the other party.

Awaiting your advice on this coverage, we are

Yours truly,

R. O. DEACON LUMBER CO.,

By R. O. DEACON.

(Witness continuing.) I did not have any conversation with Mr. Drenth in reference to the subject matter of this letter that you have just read. The letter was in the office. He delivered the letter to the office and I read it afterwards but not while he

(Testimony of Ben C. Sturges.)

was there. I did not personally, after reading the letter, call Mr. Drenth, and discuss it with him. I had Mr. Haney do it and then we issued the policy. I didn't have any of our Fresno agencies check up on the information contained in the letter that was delivered by Mr. Drenth. It was not a customary procedure. When Mr. Drenth first came there and talked to me about coverage, I told him it was necessary that we have names of the previous carriers, also their experience both as to frequency and as to the severity of losses. I said previous carriers and when we ask for that information, we usually expect the experience for a minimum period of three years, and if the previous experience prior to that time has been unsatisfactory, we wish to know that. Three years is the period that we ask for previous experience. I asked Mr. Drenth for the experience of the previous carriers and that experience is customarily figured three years. In this case, it is not a fact that I asked him for the past year's experience. I saw the letter designated as plaintiff's Exhibit 2, [42] although I didn't discuss the contents at all with Mr. Drenth when it was delivered to my company. When I saw the letter I noticed the first paragraph, where it states, "Gentlemen, we note your letter of the 3rd, it should have been answered yesterday." I remember seeing that. I did not, as the representative of the defendant company, inquire as to what letter he referred to as the letter of the third, or the contents thereof. We never had

(Testimony of Ben C. Sturges.)

that letter in our files. I never got a copy of it or requested a copy of it. The letter that you now show me did not accompany the copy of the letter designated as plaintiffs' Exhibit 2. I have never seen that letter. According to the date only, it would appear that it was subsequent to my original conversation. Mr. Drenth said he would ascertain the information. I did not know whether he had written or he was going to call upon him. He had written. When I saw the letter designated as plaintiffs' Exhibit 2, I knew he had written. I recall only two conversations that I had with Mr. Drenth in reference to this insurance. The second conversation took place probably a week or ten days after I originally discussed the matter with him, in the latter part of April or the first part of May. It might have been around the first or second of May that we discussed it, that is the first conversation. Then I had a second conversation a week or ten days later. I had the first conversation with him previous to May 5, 1934, the date of plaintiffs' Exhibit 2. I don't remember just how many days. The second conversation was some time subsequent to that date. I don't recall just how many days, I would judge within a week. The persons present at the conversation were Mr. Drenth and myself.

“Q. Will you relate the conversation, please, that you had with him, as nearly as you can recall? I mean I want you to tell exactly what

(Testimony of Ben C. Sturges.)

you can remember, but I know you can't repeat [43] it word for word, Mr. Sturges?

A. Well, he stated that he had secured the information from the Deacon Lumber Company, had submitted it to our office, and he stated that the Maryland Casualty Company had had one claim, and small claims in the Madison. That is all I recall was discussed."

There wasn't any further discussion because it had been submitted to our underwriting department. I told him that the underwriting department would review the matter, and then if they reported favorably, the policy would be issued. The list of cars included in the fleet, together with the several coverages were submitted to Mr. Haney. He is the chief underwriter in the office and the correspondence which Mr. Drenth stated that he had received was turned in to our office, so that the two matters were at that time to have consideration. Mr. Haney's duty was to cooperate in the underwriting risks. He was to pass upon the usual lines of business submitted within his authority, and anything that he wished to submit for my consideration, or he deemed it necessary, he did so. If there was any question in his mind in relation to the risk, any risk submitted, he discussed it with me. If there was any material question in his mind, he could investigate. He had the right to and he was expected to. I relied upon him carrying out his duties in reference to any insurance that came into the office, or any

(Testimony of Ben C. Sturges.)

applications that came, and if he struck a knotty problem of any kind, then he was supposed to take it up with me, or if he was uncertain about whether or not to okeh an application, then it was discussed with me. In my first conversation with Mr. Drenth he stated that he understood the line was satisfactory, it had been reported to him as such, and it was at that time I told him that before we could entertain it, we must have the previous carriers' experience in relation to claim experience. He stated he would secure the [44] information from his clients in due time. Counsel for the plaintiff then offered in evidence a copy of a letter dated May 3, 1934, addressed to "R. O. Deacon Lumber Company", with the typewritten signature, "Empire Agency Corporation," initialed "JD:S." The document was received in evidence and marked as plaintiffs' Exhibit 4. A copy appears in the deposition of Mr. John Drenth.

"Q. By Mr. Peckinpah: I show you a document here and ask you if that is the note and contract that you spoke of in your direct examination as having been received, signed by R. O. Deacon, as a payment for premium of the policy? A. It is.

Mr. Peckinpah: I ask at this time it be introduced in evidence as Plaintiffs' Exhibit 3.

The Court: Let it be received and marked Plaintiffs' Exhibit 3."

(Testimony of Ben C. Sturges.)

Redirect Examination

Mr. Drenth did not at any time mention the Metropolitan Casualty Company to me. He didn't at any time tell me that the Metropolitan Casualty Company had a list of accidents. He didn't at any time tell me that the R. O. Deacon Lumber Company Insurance had been carried in the Metropolitan Casualty Company. The only two insurance carriers he mentioned to me were the Maryland Casualty Company and the Madison Insurance Company.

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Testimony of

WILLIAM E. HANEY,

Direct Examination

In the year 1934 I was associated with the General Casualty Company of America. I was with that company from about February, 1934, until 1936 around October. I was chief underwriter, stationed in San Francisco. I know Mr. John Drenth. He was an insurance broker with the brokerage firm Empire Agency Corporation. He was not, nor was the agency company connected in any way with the General Casualty Company. Sometime in 1934 I saw Mr. Drenth [45] in regard to the R. O. Deacon Lumber Company line. That was probably the early part of May of 1934. He discussed with me the acceptance of the risk and asked if we would write

(Testimony of William E. Haney.)

a risk of that nature for the R. O. Deacon Lumber Company. He spoke to me personally. I told him that we would consider lines of that nature, but only if the past experience over a period of years had been good, if they had not had many claims or any severe claims, that we would consider it, but it would be absolutely necessary for us to have full information as to their experience for a period of at least three or four years. We call that type of line a commercial fleet line. Mr. Drenth at that time told me that he understood the experience was good. However, he would get the information that we had to have, the accurate information as to the exact experience on that line. I saw him after that time and had a conversation with him about it. The second conversation brought out that the Maryland Casualty Company had been on the line and they, as far as their experience, they had had a small amount of losses, somewhere around \$50.00, \$53.00 in property damage, no public liability losses; they had had their insurance for a short time in the Madison. The losses there were very small but their insurance was useless due to the fact that the Madison had retired.

Q. By Mr. Alexander: I have here some papers that I am showing you—no. I am showing you one paper. It happens to be attached to other papers but not connected. Without disconnecting this paper temporarily—I do not think we will need to—I am showing you a



(Testimony of William E. Haney.)

yellow sheet and ask if you have seen it before?

A. Yes; I have.

Q. And can you tell us when you saw that yellow sheet?

A. Before the policy was written this sheet was given me by Mr. Drenth. [46]

Q. I notice now on one side—it has writing on both sides, has it not? A. Yes, sir.

Q. On one side I see a number of numbers: "1-1A-2-2A-3-4-4A." What are they?

A. They are pieces of equipment operated by the R. O. Deacon Lumber Company.

Q. And on the other side there is written "Maryland". Was anything said about the Maryland? A. Yes, sir.

Q. And I see that after that some words: "No losses." Who wrote that?

A. That was on it when Mr. Drenth gave it to me.

Q. Mr. Drenth gave that to you?

A. Yes, sir.

Q. Now, I notice under that "P. D. claims amounted to only \$53.00 in 3 yrs." "P.D." means property damage? A. That is right.

Q. And "Not a long haul operator." The word "Brandenburg" is there. Do you know what that meant?

A. Mr. Brandenburg is in the Maryland Casualty. He is an automobile underwriter, and it probably meant that he could verify that experience.

(Testimony of William E. Haney.)

Mr. Alexander: I think I will have to take this off. I rather apologize, your Honor, for this lack of formality.

Q. The entire paper, you say, was given to you by Mr. John Drenth before the policy was written? A. Yes, sir.

Q. And was it used by you in making up your mind as to whether to accept or reject that line? A. It was.

Mr. Alexander: We offer this in evidence, your Honor. [47]

The Court: Let it be received in evidence and marked Defendant's Exhibit B.

The Metropolitan Casualty Company was not mentioned to me at any time by Mr. Drenth. I did not at any time prior to the death of Mr. Gates, which was toward the end of September, 1934, know that the Metropolitan Casualty Company had been the insurance carrier for the R. O. Deacon Lumber Company. I didn't know that the Metropolitan Casualty Company had a long list of losses, both property damage and public liability with R. O. Deacon Lumber Company.

Q. By The Court: Mr. Haney, with reference to Defendant's Exhibit B, is this on this side, this list of cars in your handwriting?

A. No, sir.

Q. Do you know whether it is Mr. Drenth's handwriting?

(Testimony of William E. Haney.)

A. I could not say as to that. That paper was given me by him and I don't know whether it was furnished to him by the R. O. Deacon Lumber Company or whether he wrote it.

Q. He gave it to you?

A. He gave it to me.

Q. What about these on the other side?

A. That was on there.

Q. That was all on?

A. That was all on there.

Q. The word "Brandenburg", was that on there, too?

A. As I recall it, your Honor, it was, but I could not swear to that. I am not sure as to that.

Q. The words "Madison-out" seem to be crossed out with a line there. Do you know anything about that?      A. No, sir.

Q. Do you know who wrote the words "Madison-out" on there?

A. No; I don't. [48]

Q. Were they on there when he showed you the paper?      A. I don't remember.

Q. If they were on there you do not know who crossed them out?

A. No. It might possibly have been crossed out due to the fact that the Madison had gone out of business and there was no way of checking the experience with them. There was no office to check with.

(Testimony of William E. Haney.)

I had at least two conversations with Mr. Drenth prior to the issuance of the policy involved in this case. I never saw the letter marked plaintiffs' Exhibit 2 before. Before issuing the policy I was called upon to give consideration to the desirability of the company, accepting or rejecting it. I heard the testimony given by Mr. Swift. If that information had been given me, I would not have authorized the issuance of this policy on account of the frequency of accidents. Likewise, if I had the information that was given in the testimony of Mr. Masi, I would not have issued that policy. The reason is frequency of accidents. I had never heard of the Metropolitan Casualty Company at all in connection with the R. O. Deacon Lumber Company prior to the issuance of the policy. I did not hear of the Metropolitan Casualty Company in connection with that policy until after the Gates accident. In my conversation with Mr. Drenth I asked him the names of the insurance carriers of the R. O. Deacon Lumber Company. The names given were Maryland Casualty Company and the Madison. The Metropolitan Casualty Company was not mentioned at all by him. None of the accidents that I have heard testified to in connection with the Metropolitan Casualty Company were mentioned to me. In acting in this matter, I relied upon the statements made by Mr. Drenth to me. Frequency of accidents bears more importance in considering the acceptability of a risk of this nature than any other [49] consideration.

(Testimony of William E. Haney.)

### Cross Examination

My first conversation with Mr. Drenth was in the early part of May. It took place in the office of the General Casualty Company at 114 Sansome Street. Persons present were just Mr. Drenth and myself. He wanted to know about this risk. He had discussed the risk with Mr. Sturges and then he came to me, as chief underwriter, to work out the details of handling the risk. And I told him at that time that we would have to have the names of the previous carriers and the experience for three or four years in order to judge whether or not we could accept the risk or not. I told him that if the experience were good for that period of time we would give it very favorable consideration. I happen to remember that I said three or four years because that is one of the fundamentals of underwriting that business, and I always insist on at least that much information, for that much experience on a risk of that nature because one year won't give you the experience on it. I may have told counsel for the defendant that conversation before this answer was drawn up. I couldn't remember altogether what I told him but I told him what I could remember about it. I had another conversation with Mr. Drenth which took place the early part of June, around the first couple of days in June. At that time Mr. Drenth came in with a list of the equipment and with the information that the Maryland Casualty Company and the Madison had been

(Testimony of William E. Haney.)

on the line. With the information as given me by Mr. Drenth, and having one of my girls check with the Maryland Casualty Company to see that that report was correct as far as the Maryland was concerned, and deciding that we could not check with the Madison because it had withdrawn from the state, I took Mr. Drenth's word for it for the accuracy of the experience and accepted the line without any other inquiry. We checked with the Maryland to see that the [50] experience with them was correct. We found out that it was approximately correct. They gave us an experience of around \$53.00 or \$54.00 in property damage and no public liability. That was all we were interested in, because we were only writing public liability and property damage. That was around the first part of June. I notice up at the top of the plaintiffs' Exhibit 2 that it has "6/2/34". I did not put it there, I have never seen it before. I did not ask the Maryland Casualty Company about one of the trucks of the Deacon Lumber Company being completely destroyed, nor did anyone under me ask them. No one under me, within my knowledge, called up R. O. Deacon and asked him about that when we found that the Maryland Casualty Company had been in complete loss of a truck. I did not make any inquiry from Mr. John Drenth in reference to the Maryland Casualty Company not having a record of a complete loss of a truck. I asked him for the experience of the Maryland Casualty Company,

(Testimony of William E. Haney.)

which he gave me. I have never seen the letter marked plaintiffs' Exhibit 2. I did not inquire of the Maryland Casualty if they had ever cancelled the policy for the R. O. Deacon Lumber Company. I just simply asked them if they had a loss of \$58.00. That is all I asked them.

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Testimony of

A. V. MASI,

Direct Examination

I am in the insurance business, in the Metropolitan Casualty Company. I have been with the company for quite a number of years. I am the assistant secretary in charge of claims. All casualty claims come under my supervision. The Metropolitan Casualty Company carried the automobile liability lines of the R. O. Deacon Lumber Company. The last policy that was carried in the Metropolitan expired November 10, 1933. There was a policy of the R. O. Deacon Lumber Company in the Metropolitan Casualty Company covering from November 10, 1932, to November 10, 1933, and there was likewise a policy from November 10, 1931, to [51] November 10, 1932. Under those two policies the R. O. Deacon Lumber Company reported losses. The first accident was on February 26, 1932, which was reported by Mr. Deacon. It was a loss involving personal injuries. No money was paid, only an adjust-

(Testimony of A. V. Masi.)

ing expense. The next one that came in was on June 26, 1932. It was also reported by Mr. Deacon. It was for personal injuries. It involved the payment of \$235.55 and \$15.00 adjusting expense. The next one is in the next policy year from 1932 to 1933, occurring January 4, 1933. That was personal injuries and it was reported by the agent of Mr. Deacon. The next report was on February 1, 1933. It was reported by Mr. Deacon. It was an accident involving a car driven by Mr. Deacon, a LaSalle Sedan. He ran into the rear of another automobile and caused injuries to people in the car, and it was settled for \$700.00. That was his own personal accident. The next one was on March 23, 1933, also reported by Mr. Deacon. It was a personal injury claim and involved a judgment being rendered for \$16,000.00, which was eventually settled by us for \$11,875.89 and total adjusting expense of \$1,923.56. The settlement was made on May 10, 1934. The next was an accident of September 29, 1933, which was reported by Mr. Deacon personally. There were six property damage claims and two potential personal injury claims. On the six property damage claims, there was \$1,245.60 paid and nothing paid on the personal injuries.

#### Cross-Examination

The policy expired on November 10, 1933, and we refused to renew it with that bad experience. They applied for renewal and we refused to renew it. I do not believe that the settlement I have testified



(Testimony of A. V. Masi.)

to that took place in May of 1934, involved the total destruction of a truck. It was an accident that occurred where the Stockton and Manteca highway intersects. The truck was stopped on the highway, as I recall it, and I believe that it was an Exami-

[52]

ner or Chronicle truck that ran into the rear of it causing severe injuries to the driver. The September accident, the one of the property damage for \$1,200.00, occurred right here where, I believe, it is your street cars, cross the highway just north of the city limits, where the truck struck the street car. That caused damage not only to the street car, but to the signals and S. P. signals and there were six property damage claims in that case. I believe the truck was very badly damaged. I couldn't tell you offhand whether it was a total loss or not. We didn't insure the truck for damage to the truck itself, so I didn't pay any attention to that.

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Testimony of

C. L. SWIFT

I am an insurance adjuster. During the years 1932 and 1933 I investigated and adjusted claims in this territory for the Metropolitan Casualty Company. During the time I was doing this work for Metropolitan Casualty Company I adjusted accidents that had been reported to the Metropolitan Casualty Company by the R. O. Deacon Lumber

(Testimony of C. L. Swift.)

Company. I handled practically all the losses in this territory. The R. O. Deacon Lumber Company office was in Lemoore and they did long distance trucking, so that if they had accidents in other counties or districts, they might not come under my attention. I handled four cases of accidents for the R. O. Deacon Lumber Company in 1932 and five cases in 1933. Some included injuries and some did not. We had the collision—the Lloyd's group is a sister of the Metropolitan Casualty, a sister company, and the fire company has the collision and the fire and theft and property damage. Metropolitan Casualty carried the public liability. The last of these accidents that I investigated was in September, 1933. Both property damage and public liability were involved in that accident. The property damage claims were paid, and, as I recall, the public liability case, there was no payment made on it. There was a report in from the R. O. Deacon Lumber Company on the public liability under that policy. [53]

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Testimony of  
H. H. MUNROE

In the year 1934 I was an employee of the claims department for the General Casualty Company and the General Insurance Company of America. One writes the fire and the other the property damage and public liability. Prior to the first week of October, 1934, I did not know anything at all about the

(Testimony of H. H. Munroe.)

insurance of the R. O. Deacon Lumber Company, and I heard of an accident in which Mr. Gates lost his life about September 20, 1934. After that happened I went to Fresno and contacted a Mr. Dewey—I believe he was the driver of the truck, and a Mr. Farrar—I think he was the helper. I went with them to the office of Everts, Ewing, Wild and Everts and had a conference there with Mr. Conway. They represented the company and they were taken there for the purpose of giving them such information as I had before going back to San Francisco. That was somewhere around the first part of October. I had a meeting with the driver and the helper on the truck. Mr. Deacon was there, but whether he was present at the time with the other two I don't know. It seems to me he came in later. I had a conference with him and then we had a joint conference, Mr. Conway and myself with Mr. Deacon. During that time I didn't learn anything about a prior experience of the R. O. Deacon Lumber Company. After that I came back to San Francisco, but somewhere during my stay up there, I was informed about the Metropolitan Casualty Company being on the risk. I returned to San Francisco right away after learning of the Metropolitan Casualty Company. I came back, I think, the same day. I went over and asked the Metropolitan what their experience had been. I ascertained from their records that they had five property damage claims from the R. O. Deacon Lumber Company in the year 1934. I

(Testimony of H. H. Munroe.)

also ascertained from the records that they had several personal injury claims. When I obtained that information from the Metropolitan Casualty Company, I conveyed it to the head of the department.

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The court ordered the taking of the deposition of John Drenth as a witness for the plaintiffs, and, by stipulation of counsel, it was ordered that upon the filing of the deposition with the clerk, the cause be submitted on briefs. On motion of defendant, the court ordered the complaint amended by marking out the words "during the year" in line 22 of page 3 and in line 2 of page 4 of the complaint.

The foregoing is a statement in narrative form of the testimony and proceedings at the trial material to the points to be urged by the appellants.

DAVID E. PECKINPAH

HAROLD M. CHILD

L. N. BARBER

Attorneys for Plaintiffs

Approved this 16 day of November, 1940

REDMAN, ALEXANDER &  
BACON

JEWEL ALEXANDER

W. C. BACON

Attorneys for Defendant.

[Indorsed]: Filed Nov. 18, 1940.

[55]

[Title of District Court and Cause.]

DEPOSITION OF JOHN DRENTH

Fresno, California.      January 6, 1940

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Be it remembered that pursuant to the attached stipulation, the deposition of John Drenth, a witness for the plaintiffs in the above entitled action, was taken before Molly Poole, a notary public in and for the County of Fresno, State of California, at her office, 431 Brix Building, Fresno, California, on January 6, 1940, commencing at 9:30 o'clock a.m. The plaintiffs were represented by David E. Peckinpah, Esq., and L. N. Barber, Esq., and the defendant was represented by Jewel Alexander, Esq. The following proceedings were had and testimony taken, to wit: [63]

Mr. Peckinpah: This is the case of Gates et al. vs. General Casualty Company, in the United States District Court for the Southern District of California, Northern Division, No. 30, Civil. Pursuant to stipulation entered into between counsel for plaintiffs and counsel for the defendant, dated the 29th day of December, 1939, we will take the deposition of John Drenth.

Mr. Alexander: Yes.

Mr. Peckinpah: And it will be stipulated the notary need not remain?

Mr. Alexander: Yes.

## JOHN DRENTH:

Being first duly sworn by the Notary, testified as follows:

Mr. Peckinpah:

Q. Will you state your name?

A. John Drenth.

Q. Where do you live, Mr. Drenth?

A. I am living in Redwood City, California, is my home, but I have offices in Chicago at present. I am there most of the time.

Q. Rather a long way to commute, isn't it?

A. Yes.

Q. What is your business?

A. Insurance broker.

Q. Were you—were you in that business before you went to Chicago?

A. Yes. I was in that business ten years.

Q. Directing your attention to May, of 1934, were you in the business of insurance broker?

A. I was, yes.

Q. Where?

A. San Francisco, 231 Sansome Street. [64]

Q. Now, will you describe to us generally what you mean by being in the business of insurance broker? Just what did your business consist of, just generally?

A. An insurance broker solicits business and represents the assured in the placing of that business with companies when he gets an order to place a certain policy.

(Deposition of John Drenth.)

Q. Now, in connection with that business, did you have a customer known as the R. O. Deacon Lumber Company.      A. I did, yes.

Q. How long had you done business for that R. O. Deacon—for R. O. Deacon?

A. Possibly a year before that time.

Q. A year before that time. Did you have occasion to transact any business in the way of procuring insurance for the R. O. Deacon Lumber Company in May, 1934?

A. I am not sure of the exact date, but it was sometime in the latter part of April or 1st day of May, I received an application from R. O. Deacon, asking if I could place his liability and property damage insurance on these trucks, because the Madison Insurance Company had gone into liquidation, and he was without coverage.

Q. What did you do with reference to his request, Mr. Drenth?

A. Well, at that time I had been placing truck business, which is very hard to place, in whatever company would write the business, and I had done considerable business with the Globe Indemnity Company, placing quite a few lines there, and the man who handled the transactions for me was a man named Joe Conolly. He had left the [65] Globe, resigned from the Globe, and had gone to work for the General Casualty Company at Seattle, Washington. He was in the habit of dropping into the office

(Deposition of John Drenth.)

regularly to see if I had any business to place, as is the custom in San Francisco with the brokers. And he came into the office, as was his custom, and I presented him with this request from R. O. Deacon for insurance. He took all the information that was given in Deacon's first request, and said he would see what he could do about it.

Q. What was the nature of the information?

A. It was—the original information was a list of the trucks with the motor numbers and the territories in which they operated; and I recall specifically that Mr. Deacon called attention to the fact that the previous policy losses—

Mr. Alexander: (Interrupting) Just a moment. We object to what Mr. Deacon called attention to. Upon the ground that it is incompetent, irrelevant and immaterial, and hearsay; and furthermore, is not responsive to the question. I wonder if we could have the question read, Mr. Peckinpah?

Mr. Peckinpah: Yes.

(Question read.)

Mr. Barber: That refers to the information that you gave Mr. Conolly and not the information that Mr.—

Mr. Peckinpah: Just confine yourself to the information that you gave to Mr. Conolly.

A. I gave him Mr. Deacon's letter which listed the [66] numbers of the trucks, and the models and the areas in which they were used.



(Deposition of John Drenth.)

Q. Then what happened?

A. Mr. Conolly went over to his own office and said he would see what he could do about it, and he came back and said they had to have some information as to who carried the risk, prior to the Madison Insurance Company.

Q. Now, let me interrupt you there just a minute. Did he come back that same day?

A. I think not. I think it was the next day.

Q. The next day?

A. It was within one day, it wasn't over one day. He came back and said they had to have some more information as to who carried the line prior to the Madison Insurance Company, because on this kind of a risk—this was new business to the General, trucking business, and they wanted to find out if there had been any prior claims.

Q. What did you tell him?

A. I told him I had no record of it. Of course, the only thing I could do was to write Mr. Deacon and get the information.

Q. I show you a letter dated May 3rd, 1934 and ask you if you have seen that letter before?

Mr. Alexander: Now, this time may not be the right time, but to prevent any question, I object to reference to that letter upon the ground it is incompetent, irrelevant, immaterial, and calls for hearsay, and not binding upon the defendant. [67]

Mr. Barber: That is the objection that was made

(Deposition of John Drenth.)

and overruled when the copy was offered.

Mr. Peckinpah: Q. Have you seen that?

A. Yes.

Q. Will you tell us what it is?

A. It is the letter I wrote Mr. Deacon asking for the information Mr. Conolly asked me for.

Mr. Peckinpah: Now, at this time, in order to identify it, we are going to make the request that it be—

Mr. Barber: That is Plaintiffs' Exhibit 5.

Mr. Peckinpah: Be introduced in evidence as—we are going to ask this be introduced in evidence also as plaintiffs' exhibit next in order.

Mr. Alexander: And to which we urge the same objection that we made before.

Mr. Peckinpah: And in order that it may be contained in the deposition, until the Court can rule upon it, I am going to read the proposed exhibit—

Mr. Barber: Well, the original may be attached to the deposition.

Mr. Peckinpah: Well, we can do that.

Mr. Alexander: And the reading will be likewise subject to the same objection.

Mr. Peckinpah: Yes, that is understood. This is a letter written on the heading entitled: "John Drenth, Manager," in the left-hand corner, and "Telephone EXbrook 5900," on the right-hand corner as you look at the paper. "Empire Agency Corporation. Supreme Insurance Protection. 231 [68]"

(Deposition of John Drenth.)

Sansome Street, San Francisco." All in printing.  
The rest in typewriting: "May 3, 1934.

"R. O. DEACON LUMBER CO.

Lemoore, California.

"Dear Rod:

Please give us the name of the Insurance Company you were insured with the last year and also the number and any other available information on liability and property claims.

We enclose the covering note issued April 26th and will keep you covered until we can get the policy issued.

Yours very truly,

EMPIRE AGENCY CORPORATION,

By JOHN DRENTH

Manager."

in typewriting. And then, the lower left-hand corner, "JD:S" and underneath that: "Encl."

Q. The name, "John Drenth" that appears on this letter which I have just read, is your signature, is that right?      A. Yes, that is right.

Q. Mr. Reporter, you will attach this original to the deposition so that it can be a part of it. Now, did you receive any reply from the R. O. Deacon Lumber Company in response to that?

A. I did. I got a letter back within two or three days after that—almost at once.

Q. I will show you a copy of a letter, the original of [69] which is Plaintiffs' Exhibit 2 in this case,

(Deposition of John Drenth.)

and ask you if you received—if you remember receiving the letter, such as the copy I hand you?

A. Yes, I recall having such a letter.

Q. When you received the letter from the R. O. Deacon Lumber Company, dated May 5, 1934, and referred to as Plaintiffs' Exhibit No. 2, what did you do?

A. I called Mr. Conolly and gave him a copy of it—or the original; I am not sure which.

Q. Did you have any further discussion with Mr. Conolly in reference to the—

A. None as far as claims were concerned, no.

Q. Now, this letter, I notice, is dated—Plaintiffs' Exhibit 2, is dated May 5, 1934. It was within a short time after that that you received it and called Mr. Conolly?

A. It couldn't have been over three days because I always attended to everything of that kind the day it came into the office.

Q. Did the General Casualty Company accept the insurance and issue the insurance?

A. They did.

Mr. Alexander: Just a moment. Just a moment, now. May that answer go out for a minute?

Mr. Peckinpah: Yes, I'll stipulate that the answer go out.

Mr. Alexander: I object to that because it calls for his opinion and conclusion on a legal matter.

Mr. Peckinpah: I will withdraw it. What happened after you gave the copy of the letter of May

(Deposition of John Drenth.)

5, 1934, designated [70] as Plaintiffs' Exhibit No. 2, to Mr. Conolly?

A. Within a few days' time he told me the policy would be issued, and wanted to know how the premium was to be paid; and I told him that we would not guarantee the premium for any long haul trucking, and therefore we had to prepare some kind of instalment payment contracts and get a down payment from Deacon before the policy would be issued.

Q. And were they prepared?

A. They were prepared, and eventually the check came in from Deacon and was turned over to the General Casualty Company, or, to the—their finance company, whatever company it was. I don't know who financed it.

Q. And were the policies issued?

A. The policy was issued, dated June 2d, when the payment was made.

Q. Was it delivered to your office?

A. Yes.

Q. Do you know a man by the name of Haney?

A. Yes, sir.

Q. Did you know him when he was employed by the General Casualty Company?

A. Yes, I did.

Q. Now, in reference to this transaction, involving the General Casualty Company and the R. O. Deacon Lumber Company, pertaining to truck in-

(Deposition of John Drenth.)

insurance, state whether or not you had any conversation with Mr. Haney in reference thereto.

A. I did not.

Q. Did you—tell us who you talked to— Give us the names of everyone that you talked to representing the General Casualty Company, in reference to this business. [71]

A. Well, I never talked to anyone of the General Casualty employees about this risk, except Joe Conolly, until after the loss occurred.

Q. Now, did you talk to Ben C. Sturges while the policy was—during the process—

A. Not until after the loss occurred did I ever talk to Sturges about it, either.

Q. How long after you gave Mr. Conolly a copy of the letter dated May 5, 1934, designated as Plaintiffs' Exhibit No. 2, did Mr. Conolly tell you that the policy would be issued, and talk to you about the premium?

A. It would be purely a guess. I'd say three days, but I could not verify that at this time.

Q. You said that Mr. Conolly wanted to know what losses they had sustained?

A. That is right.

Q. You wrote to Mr. Deacon in reference thereto?

A. Yes.

Q. And was any particular time, in reference to the record of losses, designated, if you can remember?

(Deposition of John Drenth.)

A. Well, I had been writing considerable truck business, and it was customary that the companies always wanted to know every loss that occurred in the prior year.

Mr. Alexander: I move that go out as not responsive to the question, and incompetent, irrelevant and immaterial.

Mr. Peckinpah: Q. Had you done business with Mr. Conolly before this transaction?

A. I had, with Mr. Conolly, not with the General Casualty.

Q. I am talking about Mr. Conolly.

A. I had, yes. [72]

Q. Had you been requested by him on other occasions to give records of losses?

Mr. Alexander: Pardon me. I object to that question unless it is shown that the prior conversations were while Mr. Conolly was employed by the General Casualty Company.

Mr. Peckinpah: Q. What records—for how long a period were they—for how long a period would you give the record of losses, pertaining to your transactions with Mr. Connolly?

Mr. Alexander: We object to that as incompetent, irrelevant and immaterial, and what his relations with Mr. Conolly or other companies was, we submit, is immaterial. We are dealing here with a specific company.

Mr. Peckinpah: Now, you can answer the question. A. One year.

(Deposition of John Drenth.)

Q. Was anything said by Mr. Conolly in reference to one year, or any length of time?

A. No length of time was mentioned.

Q. What did he say, as nearly as you can recall?

A. As near as I can recall he said, "The underwriters at the office want information as to prior liability or property damage claims."

Q. Now, did Mr. Conolly get a copy of your letter of May 3d, 1934 to R. O. Deacon Lumber Company, along with the copy of the reply?

A. I think not.

Mr. Peckinpah: I will hand you this, Mr. Reporter, and you can attach that also to the transcript as a copy of [73] Plaintiffs' Exhibit 2. That is all. You may cross examine.

#### Cross Examination

Mr. Alexander:

Q. At the time you have been talking about, which was somewhere around April or May, 1934, you were connected with what brokerage firm? The name of the firm.

A. Empire Agency Corporation.

Q. That is an independent broker, is it not?

A. That is right.

Q. You were acting for it, and in the capacity of an independent broker?

A. That is right.

Q. At that time a considerable volume of its



(Deposition of John Drenth.)

business was the placing of tough or bad risks, was it not?      A. No, it was not.

Q. It was not?      A. Never was.

Q. It never was? Let me ask you this, had that brokerage firm advertised for business?

A. It did not.

Q. Now, I wonder if I can refresh your memory. Didn't Mr. Drenth write in to you, after seeing an ad——

Mr. Peckinpah: You mean——

Mr. Alexander: I did not mean Mr. Drenth, I meant Mr. Deacon. If you will just stop and think a moment.

A. The only ad I recall ever writing or having in any paper, was in a little publication that was issued by an organization called the California Truck Association.

Q. Yes.

A. Which Larry Parsons was organizing, and I did some work, because I knew a lot of truck men, and helped him get it organized. [74]

Q. Didn't he write in to you after seeing that ad?      A. I couldn't say that he did.

Q. Let me ask you this, have you his original letter to you regarding the placing of this truck line?      A. No, I have not.

Q. You have not? It wasn't done by word of mouth, was it?      A. No.

Q. He was down in Lemoore, was he not?

A. Yes.

(Deposition of John Drenth.)

Q. And you, in San Francisco?

A. That is right.

Q. So he wrote up here to San Francisco to have his line placed?      A. That is right.

Q. Did he not? He had never written before for any business, had he?

A. Yes, I had already had his cargo insurance.

Q. You had his cargo insurance? When was that placed?

A. That was placed probably three months prior.

Q. That is, about the same year?

A. The same year, yes.

Q. Now, this happened some years ago. How many policies do you think that you negotiated during the year 1934, roughly? Would it run into hundreds?

A. Policies of all kinds, you mean?

Q. Yes, of all kinds.

A. I would say close to two thousand.

Q. Close to two thousand? In that year?

A. Yes.

Q. In 1935 and 1936 and 1937 and 1938 and 1939 your [75] business has been just as active?

A. It increased steadily, yes.

Q. So it is safe to say that during the past five or six years, you have handled, oh, from ten to fifteen thousand policies?      A. That is right.

Q. That is right. And you are giving specific testimony regarding a particular policy, after a good many years, is that right?      A. Yes.

(Deposition of John Drenth.)

Q. Now, was your memory refreshed? Were any papers shown to you before the testimony here?

A. None except these two.

Q. Just these two? Did you have any correspondence with Mr. Peckinpah about the matter?

A. He wrote me, yes.

Q. Have you his letter?

A. No, I haven't, here. It is in Chicago.

Q. It is in Chicago. Now, in the letter, I think it is of May 5, 1934, which I think corresponds to Plaintiffs' Exhibit No. 2—just take a look at that—there is no mention of the Metropolitan Casualty Company in that letter to you by Mr. Deacon, is there?      A. No, there is none.

Q. You did not mention the Metropolitan Casualty Company to Mr. Conolly or anyone connected with the General Casualty Company, did you?

A. No, I did not.

Q. I will ask you a number of questions that follow from that. Mr. Deacon did not tell you that the Metropolitan Casualty Company had covered his line in 1933 up to [76] November 10th, did he?

A. He did not.

Q. Nor did he tell you that the Metropolitan had covered the line for two or three years before that?      A. He did not.

Q. Accordingly, you did not tell anyone connected with the General Casualty Company anything about the Metropolitan line? I am right, am I not?      A. That is right.

(Deposition of John Drenth.)

Q. And, following from that, Mr. Drenth—Mr. Deacon—they both begin with a “D” I guess that is why I am doing that—Mr. Deacon did not tell you anything about an accident that occurred, in which personal injuries were sustained, in February, 1932, did he?      A. He did not.

Q. And you did not tell the General Casualty Company anything about such an accident?

A. I did not.

Q. And he did not tell you anything about an accident in which there were personal injuries, in June, 1932, did he?      A. He did not.

Q. Nor did you tell or say anything about that accident to the General Casualty Company?

A. I did not.

Q. This may seem like repetition, but it won't be too long. And, of course, in regard to the last few questions, he did not tell you that the Metropolitan Casualty Company had been on when an accident occurred, involving personal injuries, in February, 1932 or June, 1932; that is right, is it not?      A. That is right.

Q. He did not tell you about any accident involving [77] the Metropolitan Casualty Company, involving his trucks, where there were accidents and injuries, in January, 1933, February, 1933 or March, 1933; he did not tell you any of those things, did he?

A. He did not, as far as the Metropolitan Casualty Company is concerned.

(Deposition of John Drenth.)

Q. And you, in turn, did not make any mention of those things to the General Casualty Company?

A. I did not.

Q. And did he tell you that in a case, under the Metropolitan Casualty Company, judgment had gone against this company, in February, 1934, for \$16,000 for personal injuries, or for a death, for personal injuries or death, I don't know which—

A. He did not.

Q. Nor, did he—of course you did not make any mention of that to the General Casualty Company? A. That is right.

Q. Did he tell you that on May 4th, the day before his letter was written to you, May 4, 1934, the Metropolitan Company, Casualty Company, had settled that \$16,000 judgment by paying \$11,875.89?

A. He did not.

Q. Nor, did you tell that to the General Casualty Company? A. I did not.

Q. Did he tell you that in September, 1933, the Metropolitan Casualty Company had sustained losses for the R. O. Deacon Lumber Company on six property damage claims? A. He did not.

Q. Nor did you give any such information to the General Casualty Company?

A. I did not.

Q. Or did he tell you that at the same time the Metropolitan [78] Company had been faced with a personal injury claim on the R. O. Deacon Lumber Company policy? A. He did not.

(Deposition of John Drenth.)

Q. And you did not give that information to the General Casualty Company? A. I did not.

Q. And you did not give it to the General Casualty Company because you did not know it, is that right? A. That is right.

Q. Did Mr. Deacon tell you that on November 10, 1933, the Metropolitan Casualty Company had refused to renew its policy with the R. O. Deacon Company on account of the past bad experience?

A. Did not.

Q. And, of course, you did not give any such information to the General Casualty Company?

A. That is correct, I did not.

Q. Did Mr. Deacon tell you that Norton & Swift, adjusters, with offices here, that is, I mean in Fresno—had adjusted four losses for the R. O. Deacon Lumber Company in 1932?

A. He did not.

Q. You did not give any such information to the General Casualty Company? A. I did not.

Q. Did Mr. Deacon tell you that Norton & Swift had adjusted five cases for the R. O. Deacon Lumber Company, for personal injury and property damage, in the year 1933? A. No.

Q. So you did not give any such information to the General Casualty Company? A. No.

Q. And the only information that you had on this past [79] experience, was that that was given to you by Mr. Deacon in his letter?

A. That is correct.

(Deposition of John Drenth.)

Q. And that letter, I think you testified, you transmitted to Mr. Conolly, or someone connected with the General Casualty Company?

A. That is correct.

Q. And in that letter there was no mention of the Metropolitan Casualty Company?

A. There was not.

Q. Did you know that the Metropolitan Casualty Company had carried the line for property damage and public liability up till November 10, 1933?

A. I did not.

Q. And did you know, or were you told by Mr. Deacon that the Metropolitan Casualty Company had refused to renew its policy at that time?

A. No.

Q. In other words, Mr. Deacon said nothing about that to you, either by letter or otherwise?

A. He did not.

Q. And of course, it follows, I take it from that, that you made no mention of that to the General Casualty Company.

A. That is correct.

Q. Did you know that the Maryland went on the line November 10, 1933, and canceled, February 25, 1934?

A. I had no knowledge of the dates.

Q. You merely knew that——

A. That the Maryland Casualty had——

Q. Had canceled out?

A. Had been on the line. That was mentioned in that letter.

(Deposition of John Drenth.)

Q. That was the only information that you—  
pardon me— [80] if I can refer to that letter,  
we are talking about the letter of May 5, 1934 to  
the Empire Agency Corporation, from the R. O.  
Deacon Lumber Company, Plaintiffs' Exhibit No.  
2. In that letter it is stated, "Our insurance was  
then—" "The later part of September, 1933, one  
of our trucks had an accident and was completely  
destroyed. Our insurance was then carried by the  
Maryland Casualty, and this loss cost them too  
much and they withdrew the coverage shortly after  
that time." You know that—that is a quotation  
from the letter. A. Yes, sir.

Q. Now, he was talking there about his truck  
—"One of our trucks was completely destroyed."  
That insurance on the destruction of that truck  
would be collision insurance, would it not?

A. As far as his own truck is concerned, it would  
be, yes.

Q. And when he refers to his own truck being  
completely destroyed, any recovery he made would  
be under a collision insurance policy. That is true,  
is it not?

A. That is true. As such, it would not be placed  
with the Maryland Casualty, because they were not  
writing collision on trucks.

Q. But the fact is—let me get the thing  
straight—so the record won't be misinterpreted.  
If his own truck was completely damaged, his pro-  
tection would be under a collision policy, would  
it not? A. It would.



(Deposition of John Drenth.)

Q. It would. Now, in the insurance that you [81] were seeking to get for him, from the General Casualty Company, you were not asking for collision insurance at all, were you? A. No, sir.

Q. You were asking for property damage; that would be for damage to other people's cars, and for public liability insurance?

A. That is right.

Q. And any reference—you were not seeking any insurance that would protect him for damage to his own truck? A. That is right.

Q. Now, did Mr. Conolly get a memo. from you—you think you gave him a memo. of the trucks and so forth? A. I did, yes.

Q. And that memo. was given him for the General Casualty Company, was it not?

A. That is right.

Q. You don't know—or, do you know, whether the memo. that has been used—that was put in evidence in this case, was that memo. or not?

A. No, I have no knowledge of that.

Q. You have no knowledge of the records on that, immediately available? A. No.

Q. Mr. Conolly was only employed by the General Casualty Company for a few months, is that right?

A. Yes. I think he—I don't know the number of months. I don't think he stayed with them over a year.

Q. Wasn't it considerably less than a year?

(Deposition of John Drenth.)

A. I couldn't say that.

Q. Your business had been with him, with another company, the Globe, had it not? [82]

A. That is right.

Q. This was the first experience you had with the General Casualty Company, — or was it?

A. That is a hard question to answer, unless I go into an explanation. Would you like to——is that permissible?

Mr. Peckinpah: You can explain your answer.

Mr. Alexander: Well, let me withdraw the question and ask it another way, because it——

A. It isn't a fair question to ask that way.

Q. What I really had in mind was, you had done considerable business with Mr. Conolly when he was with the Globe Indemnity Company?

A. That is right.

Q. Am I right in saying that this was the first piece of business that you took up with him while he was with the General Casualty?

A. That is correct.

Q. That was really the only thing I wanted to bring out. You knew, did you not, that Mr. Conolly, himself, had no powers to write a policy with the General Casualty Company, or, did you know?

A. No, I had no way of knowing what his contract with his own company was. I knew he was an employee of that company and was soliciting business for them from brokers.

Q. He was what you might call a special——

(Deposition of John Drenth.)

A. A special agent.

Q. Yes, but the policy was not signed by him, was it?      A. Oh, no.

Q. Signed by Mr. Haney, was it not?

A. I could not say [83] who it was signed by.

Q. But at any rate, he wasn't in the branch of the business that would sign a policy?

A. He was not.

Q. When Mr. Conolly first called on you was there any discussion of Deacon's former insurance, or accidents he had had, or anything of that kind?

A. I don't recall anything.

Q. When you spoke of Mr. Conolly bringing you a binder, he, himself, did not sign the binder, did he?      A. He did not.

Q. The binder was a temporary affair, was it not?      A. Yes, sir.

Q. You obtained a temporary coverage while the General Casualty Company was looking into the line, to determine whether it would write the policy or not? Am I correct in saying that?

A. That is correct. The General Casualty and all other companies at that time were, on all trucks, made their own investigation, on any risks that were submitted.

Q. And Mr. Conolly, when he came back with the binder, he told you what the company—he wanted to know what—or, his company wanted to know what companies had had the risk before, did he not?

(Deposition of John Drenth.)

A. When he came back the second time, he wanted to know what the—who had the risk, so that they could check the loss experience.

Q. Did he also want to know whether or not any policies had been canceled?

A. That is a customary question, so [84] I presume he asked it.

Q. Am I stating this correctly, that in discussing the matter with you, about the past experience, no period of time was mentioned regarding that?

A. That is correct.

Q. Regarding Deacon. And is it not a fact that you said when he came back, that you would have to get the information from the Deacon Lumber Company?

A. That is correct.

Q. And the only knowledge that you had about their past experience was that contained in the Deacon Lumber Company letter of May 5, 1934, to you?

A. The only actual knowledge.

Q. May I have the letter of May 3d—maybe you have it here— In your letter to the Deacon, R. O. Deacon Lumber Company of May 3d, 1934, you asked them to give you the name of the insurance company they were insured in the last year, and also the number and any other available information on liability or property damage claims. I quoted that right, have I not?

A. Yes.

Q. In the reply, they did not tell you that in 1933 up to November 10, 1933, the Metropolitan Casualty Company had been on the line?

(Deposition of John Drenth.)

A. They did not.

Mr. Alexander: I think that is all.

Redirect Examination

Mr. Peckinpah:

Q. Mr. Drenth, I think I asked you this before, but I want to ask it again. You had no conversation with Mr. [85] Sturges at all, of the General Casualty? A. Not prior to the claim.

Q. And you had no conversation with Mr. Haney, of the General Casualty?

A. Not prior to the claim, I did not.

Q. Your conversations and your dealing was with Mr. Conolly? A. Entirely.

Q. Now, Mr. Drenth, I want to ask you this, did you go to the General Casualty offices at any time in the spring of 1934 and solicit insurance for the R. O. Deacon Lumber Company?

A. You mean to ask them to take the policy?

Q. Yes. A. I did not.

Q. As I understand it, their representative, Mr. Conolly, called on you and asked you if you had any insurance to give them?

A. That is correct.

Q. I will ask you this specifically, Mr. Drenth, did you at any time, in the spring of 1934, call on Mr. Ben C. Sturges, Assistant Manager of the General Casualty Company in San Francisco, and request him to give insurance to the R. O. Deacon Lumber Company? A. I did not.

(Deposition of John Drenth.)

Q. You said something about the Maryland Casualty Company not writing collision insurance, in cross-examination?

A. The Maryland Casualty Company writes—is an indemnity company, and writes liability and property damage coverage. Fire and Theft and Collision is placed in another company.

Q. Is that generally known among the insurance people?

A. I think it is, by everyone that writes business with them. [86]

Mr. Alexander: I move the answer be stricken out on the ground the witness would not be qualified to make the answer that he did, in that the witness has not sufficient information to make that statement.

Mr. Peckinpah: Q. I think I have asked you this before, but I want to ask it again. Referring, again, to Plaintiff's Exhibit No. 2, the letter of May 5, 1934, from the R. O. Deacon Lumber Company to you, that is, the copy of this letter designated as Plaintiff's Exhibit No. 2, that was given to Mr. Conolly? A. It was.

Q. By you. That is all.

#### Recross Examination

Mr. Alexander:

Q. It would not be right if I did not ask another question or two, Mr. Drenth. In 1934—did this happen, to your knowledge, in 1933 or 1934?

(Deposition of John Drenth.)

A. You say, did this happen?

Q. Yes, can you tell from your own knowledge—

A. Yes, I can.

Q. That is, by looking at these letters?

A. No, because I organized the Empire Agency on March 1st, 1933, and I did not do any work with the truck association until almost a year later than that.

Q. That would bring it to—

A. Into 1934.

Q. But you had known Mr. Conolly in 1933?

A. I had known Mr. Conolly, with the Globe Indemnity Company, because I did business with them before I went to [87] San Francisco.

Q. And that was in 1933 and prior?

A. That is right.

Q. Now, take in 1934, had you ever, during the year 1934, were you ever in the office of the General Casualty Company?

A. I called in that office to see John Talcott, who was manager of the General Fire. He was manager of both companies. The only time I was ever in that office was to see Mr. Talcott on fire risks.

Q. Where was the office in 1934?

A. 200 Bush.

Q. Of the General Casualty Company?

A. 200 Bush.

Q. How long have you known Mr. Haney, whose

(Deposition of John Drenth.)

name has been mentioned?           A. Seven years.

Q. How long have you known Ben Sturges?

A. Ten years.

Q. Ten years. And during the seven years you knew Mr. Haney, you had conversations with him from time to time, haven't you?

A. I knew him when he was with Everett Brown & Sons, before he went with the General Casualty.

Q. Yes, when he was with Everett Brown. That is not so far back.

A. Well, it was in 1933 and prior.

Q. But you knew him some seven years, did you not?           A. Yes.

Q. Could you tell us every conversation you had with him during those seven years? Is your memory strong enough to do that?

A. I can tell you every conversation I had with him in the General Casualty.

Q. That isn't the question—— [88]

Mr. Peckinpah: I submit that is an answer.

Mr. Alexander: That is not an answer. Can you tell us—is your memory strong enough to give us every conversation you had with Mr. Haney during the seven years you have known him?

A. I will have to answer that no, because he later moved over to Swett & Crawford, in the bond department, and I talked to him on an average of three times a week after that.

Q. Now, take Ben Sturges. You have known



(Deposition of John Drenth.)

him about ten years?       A. That is right.

Q. Is your memory strong enough to tell us every conversation you had with him during the past ten years?       A. I believe it is.

Q. How many conversations did you have with Mr. Sturges during that time?

A. Not more than five.

Q. Well, now, tell us the conversations you had in 1930 with him, if any.

A. I had none in 1930. He was in Los Angeles.

Q. Well, you knew him ten years ago?

A. Well, I met him in Los Angeles in 1929.

Q. 1929? What conversation did you have in 1929?

A. I did not have any. I was just in the office of the people I worked for there, and I was introduced to him.

Q. Go on. Taking the years, without spreading this out, could you give us every conversation you had with Ben Sturges each year from 1929 to date?

A. The next [89] conversation I had with him was when Mr. Deacon came in and asked me to go over to the General Casualty office and discuss this loss, because it had been denied. I went over with him, and the man I talked to was Mr. Sturges. At that time I did not even know he had moved to San Francisco, as assistant manager of the General Casualty.

Q. You had not seen him between 1929 and 1934,

(Deposition of John Drenth.)

is that right? A. That is correct.

Q. But during the years, 1929 on, you testified you had been very active, writing during that time, policies that would probably be, maybe 30,000 policies—or am I going too strong on that?

A. Well, I would not say there were that many policies.

Q. 25,000, approximately? I am not trying to—Don't get me wrong, Mr. Drenth, I am not trying to bind you down to a particular number, but it would be a large number, say 20,000 or maybe 25,000, maybe some big number of that kind?

A. May I say, that is not a fair question, because of the class of business I was doing—

Q. (Interrupting) Mr. Drenth, if the question is not fair, please don't answer it. I don't want you to answer an unfair question.

A. It is'nt fair, because naturally I could not remember the transaction in every one, in 20,000 policies, over an eight or ten year period. But, the class of business I am doing is such that I can remember specific policies, [90] because we issued very few of them.

Q. Let me see if I misquoted you. Didn't you say in the year 1934 you were connected with the issuance of some 2,000 policies? Wasn't that your testimony a little while ago?

A. I said two thousand policies—the actual issuance were certificates of coverage, rather than policies, under blanket policy forms.

(Deposition of John Drenth.)

Q. Well, that is sufficient.

A. That is the same. They were not actual policies.

Mr. Alexander: I think that is all.

### Redirect Examination

Mr. Peckinpah:

Q. Mr. Drenth, I want to ask one more question. You mentioned on cross-examination that you—the first conversation since 1929 you had with Ben Sturges was when Mr. Deacon came to your office in San Francisco, and asked you to go with him to see the General Casualty Company about this claim that they were refusing?

A. That is correct.

Q. About what time was that, in that year?

A. I'd say September.

Q. Did you go with him?           A. I did.

Q. Who did you see?

A. Saw Mr. Sturges.

Q. That is Ben C. Sturges?

A. Ben C. Sturges.

Q. Now, who was present besides Mr. Deacon, yourself and Ben C. Sturges?

A. No one at the start of the conversation. [91]

Q. Will you just give us the conversation?

A. That was the first information I had that the claim was not being—the liability was being denied on the claim, was when Mr. Deacon came into my

(Deposition of John Drenth.)

office. So when we went over there and talked to Mr. Sturges, he said, "Well, you know, I haven't been up here very long. I am not very familiar with all the transactions that go on here; I had no knowledge of this case at all, and I will have to send upstairs to the claims department and get the file down before I can talk to you about," which he did. We sat in there probably forty-five minutes while he reviewed the loss reports and so forth.

Q. Tell us all the conversation that——

A. As I recall, at that time Mr. Sturges said he was not familiar with the case, he would have to investigate it further and talk to the claims department; but he could not see anything wrong with it, and that it would be taken care of.

Q. Have you given us all the conversation you can remember?

A. In so far as this case is concerned.

Q. That is what I am talking about. That was in September, you think?

A. I think it was.

Q. Of 1934. That is all.

#### Recross Examination

Mr. Alexander:

Q. I understand you to say, at that time Mr. Sturges said he was not familiar with the case?

A. That is correct. [92]

Q. And he said he would have to get the file out and examine it more carefully?

(Deposition of John Drenth.)

A. That is correct.

Q. And is it not a fact that within a few days after that, Mr. Sturges sent out the notice of rescission?

A. I presume it is, yes.

Mr. Alexander: That is all.

### Redirect Examination

Mr. Peckinpah:

Q. Did Mr. Sturges, at that conversation, say anything about having had a conversation with you in May?

A. He did not.

Q. Did Mr. Sturges at that time mention anything about any prior losses?

A. He did not.

Q. Or, did he take up with Mr. Deacon the question of the Maryland Casualty Company, or any other company that had been the carrier?

A. That was not part of the conversation at all.

Mr. Peckinpah: That is all.

### Recross Examination

Mr. Alexander:

Q. At that time Mr. Sturges did not have the file before him. That is correct, is it not?

A. That is correct, he did not. He sent upstairs for it.

Q. He said he would have to get the file, which he would do after you left?

A. No, he got it while we were there.

Q. He got it while you were there. You know

(Deposition of John Drenth.)

as a matter of fact that within a day or two thereafter, the [93] notice of rescission went out?

A. Well, I don't know how soon it went out.

Q. Well, it was very soon after that, wasn't it?

A. It probably was, because very shortly after that I did receive a letter from Deacon saying that General had returned the check, I believe, or told him they were going to, for the unearned premium.

Q. Now, do you know whether, at the time of your conversation, Mr. Monroe had been to Fresno, investigating the case or not? Or do you know?

A. No, I don't.

Q. Your idea is that your conversation was in September?           A. I think it was.

Mr. Alexander: That is all.

### Redirect Examination

Mr. Peckinpah:

Q. Mr. Drenth, Mr. Sturges procured the file from the claims department and went through it while you and Mr. Deacon were there?

A. That is right. He read through the claims report of this accident.

Q. And did he go through the rest of the file while you were there?

A. Yes, he went through it.

Q. After he got through with it did he say anything to you about any conversation he had had with you in May?           A. He did not.

(Deposition of John Drenth.)

Q. Did he say anything about any information furnished by Mr. Deacon, or you, in reference to this?      A. He did not. [94]

Mr. Peckinpah: That is all.

Recross Examination

Mr. Alexander:

Q. Did he say anything about information that Mr. Monroe had brought from Fresno?

A. No, he did not.

Q. Mr. Monroe had not gone to Fresno at that time, had he?      A. I don't know.

Mr. Alexander: All right, that is all.

Mr. Peckinpah: That is all. [95]

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State of California,  
County of Fresno—ss.

I, Molly Poole, a Notary Public in and for the County of Fresno, State of California, do hereby certify that the witness in the foregoing deposition, named John Drenth, was by me duly sworn; that his deposition was then taken at the time and place mentioned in the attached stipulation, to wit, at my office, 431 Brix Building, Fresno, California, on January 6, 1940, commencing at 9:30 o'clock a.m.; that said deposition was taken in shorthand by James Price, a competent Shorthand Reporter, and under his direction transcribed into typewriting, the

signing of said deposition by the witness being expressly waived by counsel.

In Witness Whereof I have hereunto set my hand and affixed my official seal this 13 day of January, 1940.

[Seal]                      MOLLY POOLE

Notary Public in and for the County of Fresno,  
State of California.

[Endorsed]: Filed Jan. 26, 1940. [96]

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[Title of District Court and Cause.]

#### CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 97, inclusive, contain full, true and correct copies of the Complaint; Petition for Removal of Cause to U. S. District Court; Bond on Removal of Cause to U. S. District Court; Order for Removal of Cause to U. S. District Court; Certificate of Clerk on Removal of Cause to U. S. District Court; Answer of Defendant to Complaint; Stipulation Waiving Trial by Jury; Minute Order for Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond on Appeal; Appellants' Designation of Contents of Record on Appeal; Statement of Evidence; Appellee's Designation of Additional Contents of Record on Appeal; Amendment to Appellee's Designation





In the United States Circuit Court of Appeals  
For the Ninth Circuit

No. 9707

CARRIE GATES, et al.,

Appellants,

vs.

GENERAL CASUALTY COMPANY OF AMER-  
ICA, a corporation,

Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD

Come now the appellants above named and state the points on which they intend to rely on the appeal as follows, to wit:

1. That the evidence is insufficient to support the findings of fraudulent misrepresentation and concealment by the insured with respect to its losses on public liability and property damage claims during the time prior to its application for the policy issued by appellee.

2. That the court should have found from the evidence that appellee, at the time the policy was issued, had knowledge sufficient to put a prudent person upon an inquiry which, if pursued with reasonable diligence, would have resulted in the discovery of all of the facts which the court found to have been misrepresented and concealed.

3. That the evidence is contrary to and fails to support the conclusion of law that the defendant duly and regularly rescinded the policy of insurance, whereby said contract of insurance was extinguished.

4. That the evidence is contrary to and fails to support the judgment in the foregoing particulars.

Appellants hereby designate the parts of the record which they think necessary for the consideration of the foregoing points, as follows, to wit:

Parts of Record	Page
Complaint .....	2
Answer .....	15
Statement of Evidence .....	37
Deposition of John Drenth .....	62
Findings of Fact and Conclusions of Law	22
Judgment .....	27

DAVID E. PECKINPAH

HAROLD M. CHILD

L. N. BARBER

Attorneys for Appellants

AFFIDAVIT OF SERVICE BY MAIL

C. C. P. 1013A

(Must be attached to original or a true copy of paper served)

State of California,  
County of Fresno—ss.

Dorothy Enos, being sworn, says that she is a citizen of the United States, over 18 years of age,

a resident of Fresno County, and not a party to the within action.

That affiant's residence (business) address is 431 Brix Building, Fresno, California

That affiant served a copy of the attached Statement of points and Designation of Record by placing said copy in an envelope addressed to Redman, Alexander and Bacon, Attorneys at Law at his office (residence) address 315 Montgomery Street, San Francisco, California which envelope was then sealed and postage fully prepaid thereon, and thereafter was on December 20th, 1940, deposited in the United States mail at Fresno, California

That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

DOROTHY ENOS

Subscribed and sworn to before me on December 20th, 1940.

MOLLY POOLE

Notary Public in and for said county and state.

[Endorsed]: Filed Dec. 26, 1940. Paul P. O'Brien, Clerk.